A

MECCILECT SDN BHD v. PETROSAB PETROLEUM ENGINEERING SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
NOR BEE ARIFFIN JCA
LEE HENG CHEONG JCA
B MARIANA YAHYA JCA
[CRIMINAL APPEAL NO: B-02(NCVC)(W)-57-01-2018]
8 DECEMBER 2022

C **Abstract** – *While the Courts of Judicature Act 1964, under ss. 60 and 71, spelt out the powers of the Court of Appeal, inter alia, to order a retrial, in a circumstance where the memorandum of appeal was filed without the benefit of the grounds of judgment of the trial court, the appellate court, by assessing all the evidence available, may still reach a finding without ordering a fresh trial.*

D

CIVIL PROCEDURE: *Trial – Submission of no case to answer – Absence of grounds of judgment – Whether proceedings could be vitiated – Whether amounted to judge failing to consider all evidence – Whether documentary evidence given probative value – Whether appellate court could assess available evidence and reach finding without ordering fresh trial – Whether caused prejudice*

E

On or about March 2014, the appellant ('plaintiff') carried out negotiations with the respondents ('defendants') concerning the supply, installation and dismantling of scaffolding works, at an agreed price, for the construction of tanks for the Samur Project in Sabah. The plaintiff carried out its obligations and responsibilities as instructed by the defendants. Both parties also agreed that the plaintiff was entitled to impose late interest payment on any sum which remained outstanding under the invoice upon expiry of 30 days from the date of invoice. The plaintiff contended that the defendants had only paid for the invoices issued until December 2014 and failed to make any further payments for the work done which was inclusive of the rental for the said scaffolding. The plaintiff thus sought, *inter alia*: (i) the principal sum of RM7,384,515.44; (ii) interest in the sum of RM653,288.93; and (iii) further interest of 5% per annum on the principal sum of RM7,384,515.44 from the date of filing the writ until realisation. At the High Court, after the plaintiff closed its case, the defendants elected to submit 'no case to answer' and chose not to call any witnesses based on the unsatisfactory or unreliable nature of the evidence led by the plaintiff. After a full trial, the High Court Judge ('HCJ') dismissed the plaintiff's claim against the defendants. There were no grounds prepared as the HCJ retired after delivering the decision.

F

G

H

I

Held (allowing plaintiff's appeal in part)
Per Mariana Yahya JCA delivering the judgment of the court:

(1) The appellate court can still assess the available evidence and reach a finding without ordering a fresh trial. The absence of grounds of judgment by the HCJ alone, on its own, was insufficient to cause the proceedings to be vitiated. It was not prudent always to order a retrial in civil cases where all evidence was already before the court. (para 21)

(2) The legal burden of proof rests on the plaintiff and once discharged, the evidential burden shifted to the defendants. When the defendants submitted that they had no case to answer, they were in effect making an election to proceed with their submission without giving evidence themselves or calling witnesses for their case. The discharge of their evidential burden (if any) was thus limited to the degradation of the plaintiff's and/or the plaintiff's witnesses' evidence through cross-examination. The plaintiff, on the other hand, still had to discharge its burden by leading evidence to prove that they were entitled to the claim of RM7,384,515.44 in respect of works that commenced from December 2014 up to September 2015. (paras 22, 24 & 27)

(3) The plaintiff's evidence, an email dated 30 June 2015 and minutes of meeting dated 10 September 2015, showed that the outstanding balance which was due to the plaintiff was RM2 million and was not paid by the defendants. The words 'As per our record, it showed outstanding balance of RM2 mil instead of RM4.1 mil as per mentioned' in the email clearly stated that according to the defendants' record, the outstanding balance due to the plaintiff was RM2 million. The contents of the email should not be interpreted more than what had been written by the defendants unless and otherwise rebutted by the defendants. The HCJ had thus erred in law and in fact in dismissing the plaintiff's entire claim. The plaintiff's claim for the sum of RM2 million was allowed. (paras 47, 54 & 55)

(4) The plaintiff had prepared the statement of account – outstanding invoices as in Lampiran A of the statement of claim. While a proper explanation by the maker of the statement of account on outstanding invoices as to how the figure of RM8,037,804 was obtained was of great importance and relevance, unfortunately, there was no such evidence. The plaintiff's claim in Lampiran A was not satisfactorily proven by the plaintiff. There was also no evidence led by the plaintiff to support the claim in the amount of RM1,796,799.60. Further, there was nothing in para. 9 of the statement of defence to suggest that RM938,137.37 was the amount still owing to the plaintiff. The court thus dismissed the plaintiff's appeal on the remaining balance sum, having found that the plaintiff had failed to prove its claim on the balance of probability. (paras 30, 32, 46, 47 & 56)

Case(s) referred to:

Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal [2018] 3 CLJ 427 FC ***(foll)***

English v. Emery Reimbold & Strick Ltd [2002] 3 All ER 385 ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Hong Yik Trading v. Liziz Plantation Sdn Bhd [2017] 8 CLJ 491 FC ***(refd)***

Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***

Masoud Gholizadeh Aliheidar v. PP [2015] 1 LNS 1325 CA ***(foll)***

Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor [2008] 2 CLJ 369 CA ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Sabah Land Development Board v. Teraju Hijau Sdn Bhd [2019] 6 CLJ 97 CA ***(refd)***

Subry Hamid v. Husaini Tan Sri Ikhwan & Anor [2006] 4 CLJ 50 CA ***(refd)***

Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim [2015] 2 CLJ 1037 FC ***(foll)***

Tan Ah Tong v. Gee Boon Kee & Ors [2006] 1 CLJ 1085 CA ***(foll)***

The Carbon Company Sdn Bhd v. Ng Lee Hoon [2017] 6 CLJ 189 CA ***(refd)***

Wasal Construction Sdn Bhd v. Boh Huat Chan Timber Products Sdn Bhd [2013] 1 LNS 1269 CA ***(refd)***

Yeo Ping Tieng & Ors v. Elitprop Sdn Bhd [2020] 1 CLJ 776 FC ***(refd)***

Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd [2010] 1 CLJ 484 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 60, 71

For the appellant/plaintiff - Gopal Sri Ram, R Kengadharan, How Li Nee, Marcus Lee & Mannvir Singh; M/s R Kengadharan & Co

For the respondents/defendants - Micheal Chow Keat Thye & Yeong Wen Ling; M/s Micheal Chow

[Editor's note: Appeal from High Court, Shah Alam; Suit No: BA-22(NCVC)-111-02-2018 (overruled in part).]

Reported by S Barathi

JUDGMENT

Mariana Yahya JCA:

Introduction

[1] This is an appeal by Meccilect Sdn Bhd, the abovenamed appellant/plaintiff against the decision of the learned High Court Judge in the High Court of Malaya at Shah Alam on the 15 December 2017, after a full trial. The learned High Court Judge (HCJ) dismissed the appellant's claim with costs of RM10,000 to the respondents.

[2] For ease of reference, the parties hereto shall be referred to as they were in the High Court. The appellant is the plaintiff and the respondents are the defendants. This is the plaintiff's appeal.

Salient Facts

[3] It is the plaintiff's pleaded case that at all material times, the first defendant is a related company to the second defendant and both companies are under the umbrella of the KNM group of companies. The company's search shows that both the registered and business address for the first defendant is located in Sabah while the second defendant was based in Seri Kembangan, Selangor.

[4] The KNM Group wholly owns the second defendant and has a 40% equity stake in a company known as Petrosab Petroleum Sdn Bhd which is a majority owner of the first defendant. The second defendant is also a majority owner of a company known as KNM OPGET (Sabah) Sdn Bhd which holds a 30% equity stake in the first defendant.

[5] On or about March 2014, plaintiff carried out negotiations with the defendants concerning the supply, installation and dismantling of scaffolding works for the construction of 22 tanks for the Samur Project ("scaffolding works") in Sabah. Subsequently, parties herein agreed for the first defendant to appoint plaintiff as a contractor for the scaffolding works. All pre-contractual negotiations were held between the plaintiff and both the defendants.

[6] Both parties agreed that the rates for the said scaffolding works are as in paras. 6(i), (ii), (iii), and (iv) of the statement of claim. We reproduce the agreed rates as follows:

(i) For erection and dismantling

  (a) Light duty – RM24.00/m^3

  (b) Confine space – RM33.00/m^3

  (c) Columns – RM30.00/m^3

(ii) For rental

  (a) RM0.30/m^3 for external and confine space

  (b) RM0.28/m^3 for columns

  The rental charges were only to be imposed 30 days after the installation and after a 'green tag' was given.

(iii) For dismantling of scaffolding that had been installed before plaintiffs appointment

  (a) Light duty – RM9.60/m^3

  (b) Confine space – RM13.20/m^3

(iv) For tanks number 4501A and 4501B

(a) Medium duty – RM27.00/m^3

(b) Light duty – RM23.00/m^3

(c) Rental rate – RM0.30/m^3 from the date of installation of the scaffolding and 'green tag'

[7] Apart from the agreed charges, plaintiff is also entitled to impose manpower charges when instructions were given by the defendants for plaintiff to carry out modifications on the scaffolding which had been installed. Plaintiff carried out its obligations and responsibilities as instructed by the defendants.

[8] The plaintiff averred that both parties had agreed that plaintiff is entitled to impose late interest payment at the rate of 1.5% every month on any sum which remains outstanding under the invoice upon expiry of 30 days from the date of invoice.

[9] Further, plaintiff contended that defendants had only paid for the invoices that were issued until December 2014. The defendants had failed to make any further payments for the work done which is inclusive of the rental for the said scaffolding.

[10] The plaintiff in para. 14 of the statement of claim sought the followings reliefs:

(i) the principal sum of RM7,384,515.44;

(ii) interest (as at 27 January 2016) in the sum of RM653,288.93;

(iii) further interest of 5% per annum on the principal sum of RM7,384,515.44 from the date of filing the writ until realisation; and

(iv) other reliefs which is deems fit and proper by the court.

The details for the sum of RM7,384,515.44 are as per the table prepared by the plaintiff and enclosed together with the statement of claim and marked as "lampiran A".

At The High Court

[11] Both parties had agreed that there were seven issues to be tried before the learned HCJ. We reproduce the same as below:

(i) Sama ada Defendan Kedua mempunyai *de facto* control, kawalan, jagaan dan/pengurusan ke atas Defendan Pertama dalam kontrak yang diawadkan/diberikan kepada Plaintif.

(ii) Sama ada Plaintif berhak untuk mendapatkan segala bayaran daripada Defendan-Defendan yang masih belum dibayar berjumlah sebanyak RM7,384,515.44 bagi segala kerja yang dijalankan dari bulan Disember 2014 hingga September 2015.

(iii) Sama ada Plaintif berhak untuk mengenakan faedah lewat sebanyak 1.5% sebulan atas jumlah yang masih dihutang oleh Defendan-Defendan.

(iv) Sama ada Plaintif berhak untuk mendapatkan bayaran bagi kerja-kerja yang telah dijalankan oleh Plaintif selepas diminta oleh Defendan-Defendan yang melebihi kuantiti/jumlah (volume) yang dinyatakan di dalam pesanan-pesanan belian.

(v) Sama ada Defendan Pertama melalui email bertarikh 30.6.2015 kepada Plaintif mengakui bahawa Defendan Pertama masih berhutang RM2,000,000.00 kepada Plaintif.

(vi) Sama ada Defendan Kedua boleh dari segi undang-undang bertanggungan berkenaan dengan perkara-perkara yang dibangkitkan di bawah kontrak yang dimasuki antara Defendan Pertama dan Plaintif.

(vii) Sama ada Mahkamah Tinggi Malaya mempunyai bidang kuasa untuk mendengar perkara ini memandangkan bahawa Defendan Pertama adalah sebuah syarikat yang ditubuhkan di Sabah, Malaysia dan maka adalah tertakluk kepada bidang kuasa Mahkamah Tinggi Sabah dan Sarawak.

[12] A full trial was conducted in the High Court in Shah Alam in which witnesses with 443 pages of notes of proceedings (see pp. 64 to 505 of record of appeal) together with 38 purchase orders (38 pages), 397 invoices (397 pages) and several documentary evidence (1051 pages, record of appeal) were filed and produced in the trial.

[13] After the plaintiff closed its case, the defendants elected to submit "no case to answer" and chose not to call any witnesses even though they have listed seven names to be called as their witnesses. Aside from that, the defendants also prepared three witness statements for the defendants in the trial.

[14] The defendants in their written submission before the trial judge submitted "no case to answer" to the plaintiffs claim based on the unsatisfactory or unreliable nature of the evidence led by the plaintiff which was on the following grounds:

(i) there is a mismatch between the plaintiff's pleaded case and the evidence of PW1 especially the amount claimed by the plaintiff which is RM7,384,515.44 and not RM7,303,942.19;

(ii) the plaintiff's claim on the invoices is purportedly premature when they failed to plead the relevant provisions of the purchase order;

(iii) the invoices are purportedly of no evidential value; and

(iv) the suit is purportedly an abuse of process. The first defendant is a company incorporated in Sabah with a business address also in Sabah and the works, the subject of the invoices, were carried out in Sabah. Therefore, whatever claim by the plaintiff against first defendant falls within the jurisdiction of the High Court of Sabah and Sarawak.

[15] After a full trial, on 15 December 2017, the learned HCJ made the following orders:

> DAN SETELAH MENDENGAR saksi-saksi Plaintif sahaja dan Defendan Defendan telah memilih untuk mengemukakan hujahan tiada kes untuk dijawab.
>
> MAKA ADALAH DENGAN INI DI HAKIM KAN bahawa tuntutan Plaintif terhadap Defendan Defendan adalah ditolak dengan kos sebanyak RM10,000.00 tertakluk kepada alokatur.

[16] There were no grounds of the judgment prepared and/or provided by the learned HCJ as the learned HCJ has retired after delivering the decision.

The Appeal

[17] The plaintiff, in its memorandum of appeal, had stated ten grounds of appeal in which the memorandum of appeal was filed without the benefit of the grounds of judgment of the learned trial judge.

[18] It is the plaintiff's submission that the dismissal of the plaintiff's claim and the failure of the learned HCJ to write grounds of judgment for the same, would amount to that:

(i) the learned HCJ had not considered all the evidence before the court;

(ii) the learned HCJ had not given the documentary evidence on its probative value;

(iii) the learned HCJ had failed to appreciate, sufficiently or at all, the plaintiff's documentary and oral evidence which had to be assumed as true;

(iv) the plaintiff was unable to identify all the factual and legal errors leading to the learned HCJ's decision and this has caused prejudiced to the plaintiff's appeal; and

(v) remit the case to the High Court for a re-trial.

Our Analysis And Decision

No Grounds Of Judgment

[19] It is trite that ss. 60 and 71 of the Courts of Judicature Act 1964 provide the power to the Court of Appeal to confirm, reverse or vary the decision of the High Court or may order a retrial or may remit the matter

with the opinion of the Court of Appeal thereon to the trial court, or may make such other order in the matter as to it may seem just. Sections 60 and 71 of the Courts of Judicature Act 1964 provide as follows:

Section 60. Powers of Court of Appeal

(1) At the hearing of an appeal the Court of Appeal shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the Court of Appeal may thereupon confirm, reverse or vary the decision of the trial court, or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

(2) At the hearing of an appeal the Court of Appeal may, if it thinks that a different sentence should have been passed, quash the sentence passed by the trial court and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed.

(3) The Court of Appeal shall in no case make any order under this section as to payment of costs of any appeal to or by the appellant or respondent.

Section 71. New trial

(1) Except as hereinafter provided the Court of Appeal shall have power to order that a new trial be had of any cause or matter tried by the High Court in the exercise of its original or appellate jurisdiction.

(2) A new trial shall not be granted on the ground of improper admission or rejection of evidence unless in the opinion of the Court of Appeal some substantial wrong or miscarriage of justice has been thereby occasioned; and if it appears to the Court of Appeal that the wrong or miscarriage affects part only of the matters in controversy, or some or one only of the parties, the Court of Appeal may give final judgment as to part thereof, or as to some or one only of the parties, and direct a new trial as to the other part only, or as to the other party or parties.

(3) A new trial may be ordered on any question without interfering with the finding or decision of the court below upon any other question.

[20] We are guided by the principle and approach set out by Lord Phillips MR in *English v. Emery Reimbold & Strick Ltd* [2002] 3 All ER 385, CA which the same principle had been adopted by our Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 and most recently in *Yeo Ping Tieng & Ors v. Elitprop Sdn Bhd* [2020] 1 CLJ 776 wherein Lord Phillips MR said under the heading *"The Approach of the Appellate Court"*:

A [26] Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of material evidence and submissions at the trial, in order to determine whether, when all these are considered, it is apparent why the judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the
B judgment, the appeal will be dismissed. This was the approach adopted by this Court in the light of *Flannery*'s case, in *Ludlow v. National Power plc* [2000] All ER (D) 1868. If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing, or to direct a new trial.

C **[21]** After having perused the submissions by both parties on this issue, we agreed with the defendants' counsel submission that based on *Tan Ah Tong v. Gee Boon Kee & Ors* [2006] 1 CLJ 1085, CA, *Masoud Gholizadeh Aliheidar v. PP* [2015] 1 LNS 1325, CA and *Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal* [2018] 3 CLJ 427, FC, the
D appellate court can still assess the available evidence and reach a finding without ordering a fresh trial. Further, the defendants contended that a retrial may be unduly prejudicial to the parties and an unnecessary inconvenience to the witnesses, if they are still available. We are of the respectful view that the absence of grounds of judgment by the learned HCJ alone on its own, is
E insufficient to cause the proceedings to be vitiated. It is also our considered view that it is not prudent always to order a retrial in civil cases where all evidence is already before us. Based on the principles enunciated in the above cases, we shall hear the appeal and assess all available evidence in the record of appeal and made our findings.

F *No Case To Answer*

Legal Burden Of Proof

[22] The legal burden of proof rests on the plaintiff. It is incumbent on the plaintiff to discharge this burden by leading evidence in examination in chief. Once the plaintiff has discharged this burden, the evidential burden shifts to
G the defendants, (see *Hong Yik Trading v. Liziz Plantation Sdn Bhd* [2017] 8 CLJ 491; *The Carbon Company Sdn Bhd v. Ng Lee Hoon* [2017] 6 CLJ 189; [2017] 4 MLJ 791; and *Sabah Land Development Board v. Teraju Hijau Sdn Bhd* [2019] 6 CLJ 97).

H **[23]** The defendant can discharge this burden, first by way of cross-examination of the plaintiff's witnesses in the course of the plaintiff's case; or second, by way of giving evidence himself or calling witnesses in the course of the defendants' case; or as is most often the case, a combination of the different method. However, if the defendants find at the close of the
I plaintiff's case that:

(i) the plaintiff has failed to lead evidence to prove his case; or

(ii) the evidence led by the plaintiff to proof his case is so unsatisfactory or unreliable that it fails to discharge the burden of prove, he may submit that he has 'no case to answer'. This was explained in *Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor* [2008] 2 CLJ 369, CA.

[24] In this case, when the defendants submit that they have no case to answer, they are in effect making an election to proceed with their submission without giving evidence themselves or calling witnesses for their case. The discharge of their evidential burden (if any) is thus limited to the degradation of the plaintiff's and/or the plaintiff's witnesses' evidence through cross-examination.

[25] The plaintiff submitted that since the defendants submit no case to answer, therefore, all evidence led by the plaintiff are presumed true. To support the plaintiff's contentions, the plaintiff referred to several cases *ie*, *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509; [1997] 3 MLJ 93, *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2010] 1 CLJ 484; [2010] 1 MLJ 85 and *Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor* [2008] 2 CLJ 369; [2008] 3 MLJ 81.

[26] The plaintiff further submitted that when the defendants were silent in their defence, the trial judge should draw an adverse inference against the defendants and the plaintiff was entitled to a finding from the trial judge that the plaintiff had established *prima facie* claim against the defendants (See: *Subry Hamid v. Husaini Tan Sri Ikhwan & Ano*r [2006] 4 CLJ 50).

[27] In *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim* [2015] 2 CLJ 1037; [2015] 3 MLJ 609 ("*Timbermine*"), the Federal Court held, the fact that the defendant led no evidence or call no witnesses did not absolve the plaintiff from discharging its burden in law. Applying the principle in *Timbermine* case, we are of the view that the plaintiff still has to discharge its burden by leading evidence to prove that they are entitled to the claim of RM7,384,515.44 in respect of works that commenced from December 2014 up to September 2015.

[28] It is well-settled law that an appellate court will not, generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of insufficient judicial appreciation of evidence. In those circumstances, appellate intervention is warranted. In *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1, FC, the Federal Court held that an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the

A trial judge was 'plainly wrong' where in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached.

[29] We observed that from the pleadings, evidence of witnesses, documentary evidence, and submissions after trial, there were issues of law and fact that has to be determined by the learned High Court Judge as follows:

B

(i) Whether the second defendant has *de facto* control, possession, and management of the first defendant in respect of a contract that was awarded to the plaintiff.

C

(ii) Whether the plaintiff is entitled to receive from the defendants all payments totalling RM7,384,515.44 in respect of work that commenced from December 2014 up to September 2015.

(iii) Whether the plaintiff is entitled to impose interest at the rate of 1.5% per month in respect of the sum due and owing from the defendants.

D

(iv) Whether the plaintiff is entitled to receive payments in respect of all works carried out by the plaintiff as per the request of the defendants which exceeds the quantity and volume set out in the purchase orders;

E

(v) Whether the first defendant pursuant to an email dated 30 June 2015 admitted to the plaintiff that a sum of RM2,000,000 owed by the first defendant to the plaintiff.

(vi) Whether the first defendant is responsible and liable in law in respect of matters pursuant to the contract executed between the first defendant and the plaintiff.

F

(vii) Whether the High Court of Malaya has the jurisdiction to hear and dispose of the dispute when the first defendant is a company incorporated in Sabah and whether the matter falls within the jurisdiction and purview of the High Court of Sabah and Sarawak.

G

(viii) Whether at the very least, judgment in the amount of RM1,796,799.60 (including interest) ought to have been granted in favour of the plaintiff. Given that this was a document-heavy dispute, the burden of proof at all times is of course borne by the plaintiff to establish the balance of probability on the amount claimed.

H

Whether The Appellant/Plaintiff Is Entitled To Receive From The Respondents/Defendants All Payments Totalling RM7,384,515.44 In Respect Of Work That Commenced From December 2014 Up To September 2015

[30] Plaintiff pleaded that the cause of action lies in the contract based on the invoices issued. Plaintiff has prepared the statement of account – outstanding invoices as in lampiran A of the statement of claim.

I

[31] PW2 (Kurunsikumaran a/l R Valoo) in his evidence testified that PW1 (Prem Anand Raj a/l Rajandran Suppiah) is the best person and/or position to explain on the said account prepared by the plaintiff. PW1 was the Executive Manager in charge of the overall accounts and the submissions of the invoices to the first defendant. PW1 in his evidence confirmed that he prepared the table of summary in lampiran A of the statement of claim.

[32] PW1 also agreed that the summary of Scaffolding Requisition was not prepared by him but was prepared on PW1's instruction. PW1 instructed his staff by the name of Siti Khatijah wherein Siti Khatijah will obtain the Scaffolding Completion Documents and filled up the details. PW1 then verified the documents and then Siti Khatijah prepared the invoices. For 104 items, each item will have minimum of two documents and maximum of three documents. Siti Khatijah was not called to confirm all the 104 items that prepared by her and also to support PW1's evidence. It is our considered opinion that a proper explanation by the maker of the statement of account on outstanding invoices as to how the figure RM8,037,804.37 was obtained was of great importance and relevance. Unfortunately, there was no such evidence. (See: *Wasal Construction Sdn Bhd v. Boh Huat Chan Timber Products Sdn Bhd* [2013] 1 LNS 1269; [2014] 4 MLJ 294, CA).

[33] PW1 was shown the Summary of Scaffolding Rental which was prepared by Siti Khatijah and when asked about the source documents from which plaintiff derived the figure on p. 442 (at the High Court), PW1 answered it was not in the bundle of documents. PW1 was extensively cross-examined by the defendants' counsel about the Summary Scaffolding Requisition and again PW1 confirmed that source documents for invoices for scaffolding rental for the sum of RM280,199.70 and RM15,858.36 were not in the bundle of documents.

[34] In order to calculate the scaffolding rental, PW1 was asked about the starting and ending dates for the erection and dismantling of the scaffolding. PW1 in his evidence said that for every erection and dismantling work, they would have the Scaffolding Completion Document/Report but informed the court that there was no such report.

[35] PW1's evidence clearly showed that he was not sure or has no knowledge as to how the figures were derived as shown in table of summary which was prepared by Siti Khatijah. PW1 in his evidence agreed that the list in the table only lists down the invoices which are only supported by the table. We find that there were various documents shown on pp. 957 to 1013 of encl. 8 for invoice no. MSB/C/001 R1 which contained as follows:

(i) summary of scaffolding rental statement;

(ii) summary of scaffolding requisition;

A (iii) scaffolding completion form;

(iv) client requisition form; and

(v) drawings.

Based on PW1 evidence, we find that PW1 was unable to explain as to how
B the above documents would support the plaintiff's claim.

[36] PW1 has testified in his evidence that plaintiffs claim is based entirely on the invoices that they issued to the first defendant. PW1 also agreed that the plaintiff's claim was not at all based on difference allegation that payment certificate has issued but not paid. In such circumstances, it is the plaintiff's
C duty to prove every single invoice that they claimed for, but they failed to do so.

[37] The defendants contended that out of 70 sets of invoices, 43 sets were only a mere summary and have no source of documents. Later, plaintiff in
D the course of the trial informed the trial court that it was altogether 63 sets of invoices. In fact, the plaintiff in its submission confirmed that there were 65 sets of invoices of which PW1 agreed that there was no source of documents to support the amount claimed.

[38] PW2 testified in court that he is the director of the plaintiff. PW2's
E role is to negotiate with the second defendant regarding the scaffolding works. Negotiations took place between PW2 and Noor Azian (Project Director of the second defendant), Jacky Nga (General Manager of the second defendant) and Adlin (sub-contract executive of the second defendant).

F **[39]** PW2 confirmed that there were four purchase orders (PO) and an addendum issued by the first defendant to the plaintiff. The PO will specify the scope of works, quantities, the unit rates for erection/dismantling and rental, schedule, and other terms and conditions such as payment terms and technical specifications. Payment shall be claimable upon completion of
G erection/dismantling with scaffolding completion work report duly signed by the second defendant and payment shall be made within 30 days from the date of issuance of the invoices.

[40] It is PW2's evidence that after the PO was returned to the second defendant, work was carried out based on the instruction in the PO. During
H cross-examination, PW2 in his evidence said that the works were carried out first and then negotiation and thereafter PO was issued. PO was issued after the event (works) and not otherwise. In fact, negotiation still took place even after quotations were issued. PW2 agreed that his earlier evidence was inaccurate.

I

[41] PW2 agreed that he was aware many of the invoices issued to the defendants were without any reference to the PO's numbers and at the same time agreed that he has no knowledge about the invoices as they were not prepared by him but did not deny that his signature appears in some of the invoices submitted by him.

[42] PW3 (Nanthakumaran a/l Al Muthu) is the site project manager for the plaintiff. His responsibility is to receive the Client Requisition Form, prepare Scaffolding Complete Document and conduct joint site inspections and measurement of quantity at the relevant sites. It is PW3 evidence that the Scaffolding Completion Document is a document to prove that the erection and dismantling of the scaffoldings were undertaken and completed by plaintiff as requested by the defendants.

[43] PW3 was asked during cross-examination about the process of the Requisition Form. PW3 answered that it was his duty to fill up all particulars in the Scaffolding Completion Document before sending them to the defendants for approval. Once PW3 received the Scaffolding Completion Document from the defendants, PW3 will forward the documents to the plaintiff's headquarters for them to prepare the invoice to bill the defendants.

[44] PW3 then changed his evidence and said, he will provide the Requisition Form to Hendry (defendants' scaffold supervisor) when requested and Hendry will fill up the form and return it to PW3. PW3 again changed his evidence by saying that he will fill up the form and not the client and later told the trial court that the client will fill up the form. The uncertain answers given by PW3 showed that PW3 was not familiar with the Requisition Form that was printed and kept by the plaintiff which forms part of the plaintiff's claim. We reproduce PW3 evidence on p. 332 of encl. 5, record of appeal which said:

> D/C: I'm going again suggest to you it is humbly impossible for you to remember or to know every item or work were in the client requisition form where your signature and name does not appear. You agree?
>
> PW3: Agree.

[45] PW4 was the Branch Manager of the plaintiff. PW4 was asked about numbers of PO issued by the first defendant. PW4 was aware about the POs but he did not know how many POs issued to the plaintiff.

[46] Looking at the entire evidence of PW1, PW2, PW3 and PW4, we find that plaintiff's claim in lampiran A was not satisfactorily proven by the plaintiff.

[47] The plaintiff in their submission alternatively claimed that the plaintiff has completed the work and payment should be made on the work done. The plaintiff contends that their claims were not only in the form of lampiran A (invoices) but also through documents that were admitted by the defendants. Alternatively, whether the plaintiff is entitled to the sum of:

(i) RM1,796,799.60 (for eight invoices) or

(ii) RM938,137.57 based on para. 9 of the statement of defence; and/or

(iii) RM2,000,000 based on an email dated 30 June 2015 and minutes of meeting dated 10 September 2015.

RM1,796,799.60 (For Eight Invoices)

The plaintiff in their submission contended that the remaining 22 invoices out of 65 invoices were not disputed by the defendants and this include eight invoices that remain unpaid by the defendants. Plaintiff contends that at the very least judgment in the amount of RM1,796,799.60 (including interest) ought to have been granted in favour of plaintiff based on those eight invoices. We find that there was no evidence led by plaintiff to support this claim.

RM938,137.57 Based On Para. 9 Of The Statement Of Defence

The plaintiff states that the defendants at para. 9 of the statement of defence had pleaded and confirmed that the total cumulative value of the purchase orders amounted to RM3,948,697.96 and that the defendants had only paid the sum of RM3,010,560.39 based on *inter alia*, payment certificates evidencing work done and materials supplied. Therefore, plaintiff contends that plaintiff is entitled to the balance payment of the said sum *ie*, RM938,137.57. We find there is nothing in para. 9 to suggest that RM938,137.37 is the amount still owing to plaintiff without any proof.

RM2,000,000 Based On Email Dated 30 June 2015 And Minutes Of Meeting Dated 10 September 2015

(i) The plaintiff referred to an email dated 30 June 2015 sent by Loh Chee Wen to PW2 (see p. 730, encl. 7, ROA) which states as follow:

> Mr. Kurunji
>
> Attached pls find the letter
>
> **As per our record, its show outstanding balance of RM2 mil instead of RM4.1 mil as per mentioned.** We need to reconcile and confirm the figure. (emphasis added)

(ii) The defendants denied that the email was an admission and averred that there was no mention as to how the RM2,000,000 was derived. The plaintiff at the High Court submitted that the word 'We need to

reconcile and confirm the figure" meant for RM2 million claimed by plaintiff. We find that there was no evidence led by the defendants to show that they need to reconcile and confirm the RM2 million.

(iii) The word of "As per our record, its show outstanding balance of RM2 mil instead of RM4.1 mil as per mentioned" clearly states that according to the defendants' record, the outstanding balance due to the plaintiff is RM2 million and not RM4.1 million. We do not think that we should interpret the content of the email more than what has been written by the defendants unless and otherwise rebutted by the defendants.

(iv) We shall now refer to the KNM-Meccilect Minutes Of Meeting held on 10 September 2015 (pp. 694 to 696, encl. 6, ROA) which was about 2 1/2 months after the email was sent by the first defendant to the plaintiff. The meeting was held at KNM Group Bhd, Sri Kembangan, Selangor. The meeting was attended by Prem Anand Raj (Meccilect), Tang Chee Hau (KNM), Wendy (KNM), and Rahim (KNM). In para. 5.4 of the minutes, it states:

> **Conclusion and Next steps**
>
> 5.4 Ms Wendy to request for partial payment of RM2 million from KNM Management.

Based on the above admission, we do not see any good reason why plaintiff was not paid for the amount outstanding in accordance with the first defendants' own record.

Whether The Appellant/Plaintiff Is Entitled To Impose Interest At The Rate Of 1.5% Per Month In Respect Of The Sum Due And Owing From The Respondents

[48] PW1 agreed that none of the four POs showed any imposition of late payment interest. PW2 in his evidence confirmed that when he signed the PO together with other terms and conditions imposed on the plaintiff, there was no additional condition added in the PO to qualify that any late payment is subject to 1.5% interest per month (p. 292, encl. 4, ROA). We find that the interest charge is not in the POs but in all invoices issued by the plaintiff to the first defendant. It is clearly stated at the bottom part of the invoice which states as follow:

> 2. We reserve the Rights to Charge interest of 1.5% per month of any late payment

The records showed that there was no evidence from the defendants to show that they disagree with the interest charge in those invoices.

A **Relationship Between The Plaintiff And The Defendants**

[49] The defendants contend that the second defendant should not be made a party to the suit because they have no contractual relationship with plaintiff. It was said that the contract was only between plaintiff and the first defendant. Thus, the second defendant should not be held liable for any
B payment due to plaintiff.

[50] PW2 in his evidence affirmed that pre-contractual negotiations took place between plaintiff and the second defendant. Plaintiff will issue the quotations to the second defendant. After negotiations, the first defendant will issue the PO under the instructions of the second defendant. The first
C defendant will then examine and certify the works carried out by plaintiff. All payments were paid once approval was given by the second defendant.

[51] PW1 testified in his evidence that the second defendant was involved in most of the correspondences between first and second defendants with the
D plaintiff. Some of the POs that were issued by the first defendant clearly require the plaintiff to submit the signed copy of the POs to the second defendant. The second defendant had also requested the plaintiff to liaise directly with the second defendant for all payments related matter. All payments were processed in the plaintiff's OCBC Bank and/or Public Bank
E in Petaling Jaya.

[52] About account-related matters, Ms. Wendy Soh from the second defendant approached plaintiff regularly for verification, clarification, and confirmation of the progress claims from the second defendant's side before making payments to plaintiff.

F **[53]** Aside from that, the conduct of the parties and the statement of agreed facts agreed and signed by both the plaintiff and the defendants speak for themselves. We shall refer to the "Pernyataan Fakta-Fakta Yang Dipersetujui" in particular paras. 4 until 11 which read:

> 4. Plaintif telah dilantik sebagai kontraktor untuk membekal,
G memasang, mengambil keluar (dismantle), menyewa dan mengendalikan kerja-kerja aram (scaffolding works) bagi projek yang dikenali sebagai Sabah Ammonia Urea (SAMUR) Project, Sipitang, Sabah,
>
> 5. Defendan-Defendan telah membuat bayaran-bayaran bagi inbois-
H inbois yang dikeluarkan oleh Plaintif sehingga akhir bulan Disember 2014.
>
> 6. KNM Group memegang 100% saham Defendan Kedua.
>
> 7. KNM Group memegang 40% ekuiti di dalam syarikat yang dikenali Petrosab Petroleum Sdn Bhd.
I
> 8. Petrosab Petroleum Sdn Bhd memegang 70% saham di dalam Defendan Pertama.

9. Defendan Kedua mempunyai kawalan 80% saham di dalam KNM OGPET (Sabah) Sdn Bhd.

10. KNM OGPET (Sabah) Sdn Bhd mempunyai ekuiti sebanyak 30% di dalam Defendan Pertama.

11. Pegawai-pegawai dan wakil-wakil Defendan Kedua terlibat dalam rundingan-rundingan dan mesyuarat di antara Defendan Pertama dan Plaintif.

Based on the above reasons, we find that the submission by the defendants that the second defendant was not involved at all in the said transactions was without basis.

Conclusion

[54] After having considered all available evidence in the record of appeal before us and submissions of the parties, we are of the considered opinion that the learned trial judge has failed to consider the plaintiff's evidence that the defendants' own record clearly showed that the outstanding balance which was due to the plaintiff was RM2,000,000 and was not paid by the defendants. Had the learned trial judge given and considered the evidential/ probative value of the defendants' email dated 10 September 2015 and the minutes of the meeting dated 10 September 2015, the learned trial judge would have allowed the outstanding sum as stated in the defendants' own record.

[55] We are of the respectful view that the learned trial judge had erred in law and fact in dismissing the plaintiff's entire claim. Unanimously, we are minded to allow the plaintiff's appeal in part and allowed the sum of RM2,000,000 to be paid by the defendants to the plaintiff with interest of 5% per annum from date of judgment until full and final realisation.

[56] As regards the remaining balance sum of the plaintiff's claim, we find that the plaintiff on the balance of probability has failed to prove its claim and we, therefore, dismissed the plaintiff's appeal on the remaining balance sum of RM5,384,515.44. We order costs of RM40,000, here and below, to be paid by the defendants to the plaintiff subject to allocator.